

ALASKA POWER ADMINISTRATION

IBLA 89-127

Decided June 11, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving conveyance pursuant to village selection applications AA-6661-B and AA-6661-G.

Affirmed as modified and remanded.

1. Alaska Native Claims Settlement Act: Native Land Selections: Village Selections--Powersite Lands

Conveyance of lands previously withdrawn under the authority of sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (1988), to a Native village pursuant to a selection made under the provisions of sec. 12 of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1611 (1988), was subject to reservations provided by sec. 24 of the Federal Power Act.

2. Alaska Native Claims Settlement Act: Native Land Selections: Village Selections--Words and Phrases

"High-water mark." The "high-water mark" of a body of water is the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. Where a reservoir is excepted from a conveyance of the surrounding lands by reference to its high-water mark, the boundary of the lands conveyed is identifiable by observing multiple factors indicating the extent of the normal impoundment of water.

APPEARANCES: Robert J. Cross, Administrator, Alaska Power Administration, Department of Energy, Juneau, Alaska; David P. Wolf, Esq., Anchorage, Alaska, for Eklutna, Inc.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Alaska Power Administration (APA), U.S. Department of Energy, has appealed from an October 25, 1988, decision of the Alaska State Office, Bureau of Land Management (BLM), approving the conveyance of lands selected in Native Village selections AA-6661-B and AA-6661-G. On April 23 and December 4, 1974, respectively, Eklutna, Inc., for the Native village of Eklutna, Alaska, filed selection applications AA-6661-B and AA-6661-G, as amended, under the provisions of section 12 of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601, 1611 (1988), for the

surface estate of certain lands in the vicinity of Eklutna. By decision dated October 25, 1988, BLM approved for conveyance to Eklutna, Inc., a surface estate of approximately 26,258 acres. Identified for conveyance were lands surrounding Eklutna Lake, a body of water created by implementation of the Eklutna Project Act of July 31, 1950, that authorized construction of a dam on the Eklutna River. 1/ The decision under review stated that the "bed of Eklutna Lake shall be excluded from the conveyance" and also that:

1/ The lands are described in the decision as follows:

"Seward Meridian, Alaska

* * * * *

T. 14 N., R. 2 E. (Surveyed)

Sec. 1, NE $\frac{1}{4}$, excluding Native allotment application AA-5834

Parcel A; NW $\frac{1}{4}$, S $\frac{1}{2}$;

Sec. 12.

Containing approximately 1,257 acres, [as shown on plat of survey officially filed May 9, 1979].

* * * * *

T. 15 N., R. 2 E. (Surveyed)

Sec. 9, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 10, NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 13, SW $\frac{1}{4}$ SW $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 14, SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, S $\frac{1}{2}$, excluding Eklutna Lake;

Sec. 15, W $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$, SE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 16, NE $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 17, NE $\frac{1}{4}$ NE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 22, N $\frac{1}{2}$ NE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 23, N $\frac{1}{2}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 24, W $\frac{1}{2}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 25, excluding Eklutna Lake;

Sec. 26, N $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, excluding Eklutna Lake;

Sec. 36, N $\frac{1}{2}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, excluding Eklutna Lake; SE $\frac{1}{4}$, excluding Native allotment application AA-5834 Parcel A and Eklutna Lake;

Containing approximately 1,460 acres, as shown on plat of survey officially filed on May 9, 1979.

T. 14 N., R. 3 E. (Surveyed)

Sec. 5;

Sec. 6, E $\frac{1}{2}$, W $\frac{1}{2}$ W $\frac{1}{2}$, E $\frac{1}{2}$ SW $\frac{1}{4}$;

Secs. 7 and 8;

Secs. 16 to 19, inclusive;

Secs. 21 and 28.

Containing 6,249.60 acres, as shown on plat of survey officially filed on May 9, 1979.

T. 15 N., R. 3 E. (Surveyed)

Secs. 1, 12, 13, 19, 24 and 25; excluding Eklutna Lake;

Secs. 30 and 31, excluding Eklutna Lake.

Containing approximately 4,889 acres, as shown on plat of survey officially filed on May 9, 1989."

Excluded from the above-described lands are the submerged lands, if any, up to the ordinary high water mark, beneath streams 3 chains wide (198 feet) and wider, and lakes 50 acres and larger, which are meanderable according to the 1973 Bureau of Land Management Manual of Surveying Instructions, as modified by Departmental regulation 43 CFR 2650.5-1, and navigable waters, if any, of lesser size.

(Decision at 6). Enumerated reservations to the United States included "[t]he subsurface estate therein, and all rights, privileges, immunities, and appurtenances, of whatsoever nature, accruing unto said estate pursuant to [ANCSA]" and specified public easements pursuant to section 17(b) of ANCSA (Decision at 7). The conveyance was made subject to "valid exist-ing rights therein" and several identified rights-of-way.

In its statement of reasons for its appeal, APA challenges the decision on the grounds that it did not discuss "the rights and interests of the Federal government in the management of Eklutna Lake" as a hydro-electric project. APA expresses concern over periodic flooding and poten-tial debris problems associated with the normal operation of the project, and explains that "the dam retains or stores all inflow to Eklutna Lake so long as the lake level is at 871 feet MSL or below," representing the elevation of the spillway crest, but that the dam is designed to tempo-rarily store water to levels as high as 885.7 feet, which is 5.3 feet below the crest of the dam and above the spillway. APA reports two minor flooding incidents which have already produced temporary storage levels of up to 2 feet above the spillway crest. APA argues the conveyance should include references to: (1) specific rights to store water up to 871 feet; (2) flood easements for periodic flooding above 871 feet, including debris or erosion problems that may occur; (3) prohibitions against shoreline development that would be incompatible with periodic flooding; and (4) restrictions on shore- line development with potential to pollute the lake or introduce significant amounts of debris. APA contends that the conveyance to Eklutna of land "above the high water mark" is a vague description and should be defined more precisely by using a description based on the elevation of the water level behind the dam at 871 feet.

In answer, Eklutna asserts there "is no basis in law to grant the APA's request * * * to exclude or encumber any land above the ordinary high-water mark" (Answer at 1).

[1] It appears that APA seeks the right to overflow lands surrounding Eklutna Lake above the usual high-water level during flood conditions and a right to restrict development on the conveyed lands. Generally, the right to overflow the land of another in accumulation or maintenance of an arti-ficial body of water is an easement acquired by a grant or by reservation in a conveyance of property. See 78 Am. Jur.2d Waters § 206 (1975); 93 C.J.S. Waters § 24 (1956). While the holder of the easement is limited by the rule that exercise of such flowage right must be reasonable, the landowner has a right to occupy and improve the property, limited only by the easement. Id. Further, the private owner of a dam is bound to maintain it in such a manner as to minimize the danger from accidental overflow but is not liable, in the

absence of negligence, if overflow occurs due to a phenomenal or extraordinary flood such as would not be reasonably anticipated. See 93 C.J.S. Waters § 153. In construing the extent of the flowage rights granted or reserved by a conveyance, the general rules of construction are applicable but, since the intention of the parties is the determining factor, each case necessarily depends in large measure on its peculiar facts. See 93 C.J.S. Waters § 27(b), 78 Am. Jur.2d Waters § 207.

Relevant BLM plats show that the lands immediately surrounding the reservoir were the subject of Public Land Order (PLO) No. 4022, issued on May 20, 1966. This PLO opened previously withdrawn lands to entry:

By virtue of the authority contained in section 24 of the Federal Power Act of June 10, 1929 (41 Stat. 1075, 16 U.S.C. 818), as amended, it is ordered as follows:

1. In DA-64-Alaska, the Federal Power Commission vacated the power withdrawal created pursuant to the filing of application for preliminary permit and for amendment thereof for Project No. 350 affecting lands (a) lying within one-half mile of the ordinary high water line of Eklutna Lake and at an elevation in excess of 900 feet above mean sea level and, (b) lying within one-half mile of Eklutna River, with the exception of 200 acres. The excepted area comprises of those portions of the S½ SE¼ of sec. 19, and the E½ NE¼ and the NW¼ NE¼ of sec. 30, T. 16 N., R. 1 E., S.M., lying within a strip 600 feet in width, embracing the diversion dam, tunnel, penstock, and powerhouse locations. The lands are described on a map designated "Exhibit K, Anchorage Light & Power Co., River Diversion and Power," and filed in the office of the Federal Power Commission on April 7, 1931, in connection with Project No. 350.

The areas described aggregate approximately 10,627 acres, of which about 10,000 acres are public lands. Some of the public lands are withdrawn for other purposes, and some have previously been restored subject to section 24 of the Federal Power Act. As to the latter, the effect of this order is to relieve the lands of the restrictive provisions of the said section 24.

2. In DA-64-Alaska, the Federal Power Commission determined that the value of the lands reserved or classified for powersite purposes, bordering Eklutna Lake, and lying below elevation 900, will not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws, subject to the provisions of section 24 of the Federal Power Act, as amended, and subject to the condition that the United States, its permittees or licensees shall not be held liable for any damage to the improvements placed thereon resulting from the construction, operation, and maintenance of any power project works there-upon. * * *

The lands described in this order surround Eklutna Lake and a portion of the Eklutna River. They are traversed by the Eklutna Road which ties into the Glenn Highway 21 miles northeast of Anchorage, Alaska.

3. Until 10 a.m., on August 19, 1966, the State of Alaska shall have a preferred right to select the public lands not otherwise withdrawn * * *. After that time the public lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. * * *

4. Any disposals of the lands described in paragraph 2 of this order shall be subject to the provisions of section 24 of the Federal Power Act, as amended and to conditions specified by the Federal Power Commission in its determination.

31 FR 7626-27 (May 27, 1966). The lands identified in the PLO, with the exception of several aliquot parts of secs. 8 and 9, T. 15 N., R. 2 E., Seward Meridian, are among those lands selected in applications AA-6661-B and AA-6661-G.

The Federal Power Commission determined that the Eklutna Lake power project would not be compromised by conveyance of these lands, and that any conveyance of these lands would be made subject to the provisions of section 24 of the Federal Power Act. APA's argument that the lands to be conveyed should be restricted to prevent development incompatible with operation of the reservoir ignores the prior Federal Power Commission's determination to the contrary. There is no basis for this type of restriction sought by APA. The PLO directs, however, in the event of entry or selection that the United States and its licensees will be relieved from liability for damage to any improvements on the conveyed land due to the operation of the power project. We find that a provision stating this condition must be inserted as a reservation into the grant to Eklutna.

While the PLO does not specifically enumerate rights to be reserved to the United States, it refers to section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1988), which provides, pertinently:

Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. * * * Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the

Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. [Emphasis added.]

The applicability of this reservation of rights to Native corporation conveyances was confirmed by Congress when, in implementing an agreement among the United States, the State of Alaska, Cook Inlet Region, Inc. (CIRI), and other interested parties to resolve the difficulties CIRI had in its entitlements, it instructed as follows:

The Secretary may, notwithstanding any other provision of law to the contrary, convey title to lands and interests in lands selected by Native corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, to such corporations, subject to the reservations required by section 24 of the Federal Power Act. This conveyance shall be considered and treated as a conveyance under the Settlement Act.

Section 12(e) of P.L. 94-204 [ANCSA Amendments], 89 Stat. 1153, 43 U.S.C. § 1611 note (1982); see also Cook Inlet Region, Inc., 90 IBLA 135, 140-41, 92 I.D. 620, 622-23 (1985) (affirmed in part, on reconsideration, 100 IBLA 135, 92 I.D. 422 (1987)). Accordingly, the conveyance to Eklutna must be made subject to a reservation of a right of entry pursuant to section 24 of the Federal Power Act, in addition to the other reservations described by the decision under review at pages 7 through 12.

The Board construes the reservation of the right to enter and use the servient lands to embrace a right of flowage thereon. The reservation in section 24 embraces occupancy or use "necessary, in the judgment of the Commission, for the purposes" of operating and maintaining the power project. Without the right to overflow the lands at issue when necessary, normal operating plans for Lake Eklutna could be frustrated. APA might find it difficult to impound the water in the reservoir at its highest maintenance level without fear that unforeseen circumstances would raise the water level above the spillway crest and flood the subject lands. Both section 24 of the Federal Power Act and PLO 4022 put the grantee on notice that the Federal grantor will not be strictly liable for injury caused by the existence of this power project. ^{2/} For Congress and the Department to consider such relief from liability to be necessary suggests that damage due to the project was foreseen to be both substantial and unavoidable.

APA has appropriately challenged the failure of the decision under review to include language subjecting the immediate lands surrounding

^{2/} The statute does not describe how injuries caused by operation of the power project might be remedied.

Eklutna Lake with reservations of rights necessary for the operation of the power project in conformity to the Federal Power Act. ^{3/} APA properly points out that BLM should have coordinated decisionmaking with APA concerning this facet of the conveyance to Eklutna. Accordingly, we modify the decision to require inclusion of a reservation pursuant to section 24 of affected lands and remand to BLM in order that it may identify those lands in the conveyance formerly withdrawn under section 24. Conveyance of those lands will be made subject to the reservations required by section 24.

[2] The remaining question posed by APA concerns the description of the lands to be conveyed. We find this argument, while enlightening, to possess little merit. APA advocates that a demarcation be made between the lakebed and the lands conveyed above 871 feet elevation. The decision under review describes the exclusion of Eklutna Lake from conveyance by reference to the "ordinary high-water mark" (Decision at 6).

The BLM Manual of Surveying Instructions, 3-115 (1973 ed.) defines the high-water mark as "the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation." BLM plats of the area show a definite boundary to the lake. That boundary line is the meander established by survey. The meander line shown on a plat is the traverse of a margin of a permanent body of water. Such a line is run to determine the quantity of land remaining after segregation of the water area. It is not a boundary but provides definition of the sinuosities of the banks of the body of water in question. The actual water's edge is the boundary of the lake. BLM Manual of Surveying Instructions, 3-115, 3-116.

When confronted with the task of ascertaining the boundary of an island in terms of the "high-water mark" of the Alaskan river in which the island was situated, the court in State of Alaska, Department of Natural Resources v. Pankratz, 538 P.2d 984, 988-89 (Alaska 1975), offered the following pertinent summary of Federal law on the subject:

The meaning of the "ordinary high-water mark" under federal law is somewhat unclear. While such a boundary line can be traced by the eye without difficulty, a definition of the phrase is useful when a bona fide dispute arises.

^{3/} Unlike the situation in Ketchikan Public Utilities, 79 IBLA 286 (1984), where we found that land occupied by a power project operated by a municipality under license from the Federal Power Commission was not a Federal installation so as to be excepted from selection under authority of section 16 of ANCSA, in this case there was a determination in 1966 by the Federal Power Commission that the subject land was to be restored to entry "subject to the provisions of section 24 of the Federal Power Act." See PLO 4022, supra. In this case, therefore, the land had been restored "subject to" section 24 reservations. No such restoration had been made in the Ketchikan situation. Consequently, the decision in Ketchikan has no direct relevance here.

In Oklahoma v. Texas, 260 U.S. 606, 625-40, 43 S.Ct 221, 67 L.Ed. 428 (1923), the Supreme Court held that the high-water mark is coterminous with the outer limit of the "bed" of the river. The court defined the bed of the river as land which is "kept practically bare of vegetation by the wash of the waters of the river from year to year, in their onward course, although parts of it are left dry for months at a time . . ." Oklahoma v. Texas, *supra* at 632, 43 S.Ct. at 225. In United States v. Claridge, 279 F.Supp. 87, 91 (D.C. Ariz. 1967), *aff'd*, 416 F.2d 933, 934 (9th Cir. 1969), *cert. denied*, 397 U.S. 961, 90 S.Ct. 994, 25 L.Ed.2d 253 (1970), the court stated:

the ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow.
[footnote omitted.]

The relevance and method of ascertaining the ordinary high-water mark was definitively explained in Borough of Ford City v. United States, 345 F.2d 645, 648-51 (3rd Cir. 1965), *cert. denied*, 382 U.S. 902, 86 S.Ct. 236, 15 L.Ed.2d 156 (1965). In that case the court noted that the demarcation of boundaries along navigable streams is generally readily observable. The court went on to explain that the high-water mark usually can be detected by observing the presence of several factors, including shelving, a change in the character of the soil, the absence of litter, and the destruction of terrestrial vegetation. When the multiple factors comprising a high-water mark cannot be found in one location, it is permissible to check for them at other sites along the stream.

If these multiple phenomena cannot be found, resort to the so-called "vegetation test" alone is appropriate. Under these circumstances the high-water mark rests at the point below which the value of the soil for agricultural purposes has been destroyed. This does not mean that all vegetation is absent below the mark, but rather that terrestrial vegetation will not grow there. [Footnotes omitted.]

The record before us indicates that the high-water mark of Eklutna Lake has been established for years and is readily identifiable for most of the lake, as explained by the following testimony from Dale Tubbs, Land Manager for Eklutna, Inc.:

I then called Mr. Stan Sieczkowski, the Area Project Manager for the Eklutna Hydro Project. In response to my questions, he informed me that elevation 871 feet was within a foot or so of the spill point for the dam. That constituted a full lake to the line of vegetation * * *.

Mr. Sieczkiwski also explained to me the dam spillway could be closed to store the additional 14 foot head of water. That would be at elevation 885. This added lake depth would be above the line of vegetation.

(Affidavit of Dale P. Tubbs, Jan. 17, 1989, at 4). The line of vegetation, or the high-water mark, appears to be at the 871-ft elevation, as APA contends. The distinction made by APA is, therefore, no different than the description employed by BLM, since the high-water mark is at the 871-foot elevation of the pool. We affirm BLM's use of the high-water mark to describe the edge of the lake.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed except as modified by this opinion, and the case file is remanded to permit inclusion of a reservation pursuant to section 24 of the Federal Power Act and PLO 4022 in conformity to this opinion.

D. Arness

____ Franklin

Administrative Judge

I concur:

James L. Burski _____
Administrative Judge